APPENDIX A.

Findings of Fact and Conclusions of Law.

The above-entitled cases having come on for hearing on June 28, 1965, before the Honorable Jesse W. Curtis, United States District Judge; the plaintiff and defendant having appeared through their respective counsel of record; and the Court having considered the pleadings, depositions, affidavit, answers to interrogatories, and admissions on file, as well as the briefs and oral arguments of the parties; and the Court having rendered its written Decision of August 30, 1965, granting summary judgment to the defendant; and the Court having considered the additional briefs, affidavit and oral arguments of the parties concerning plaintiff's motion to vacate the Court's Decision of August 30, 1965; and the Court having denied said motion on September 29, 1965; the Court now makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. This is a consolidation of three related actions for the recovery of federal income taxes paid by the plaintiff for corporate fiscal years ended October 31, 1958, October 31, 1959, and October 31, 1960.

2. The Court has jurisdiction over those proceedings under the provisions of Title 28 United States Code, Sections 1340 and 1346(a).

3. The plaintiff, under the name of Pacific Bolt corporation, filed a federal income tax return for fiscal year ended October 31, 1958, reporting net taxable income of $282,673.87 before a net operating loss deduction. It paid taxes thereon of $134,447.23 plus interest of $759.01 as follows:

Date Paid	Amount
1-14-59	$67,223.62
4-13-59	10,000.00
5-19-59	10,000.00
6- 8-59	10,000.00
6-11-59	10,000.00
7-10-59	10,000.00
8-19-59	17,226.61
11-23-59	759.01

Additional income taxes of $7,043.18 were paid on August 19, 1959 together with interest of $121.85. On November 4, 1959, additional interest of $36.34 was paid. The correct taxable income for fiscal year ended October 31, 1958 before a net operating loss deduction is $282,673.87.

4. The plaintiff received a prior refund for fiscal year ended October 31, 1958 of $96,839.55 plus interest of $1,516.27 based upon a net operating loss carryback of $186,229.90 from fiscal year ended October 31, 1961.

5. The plaintiff, under the name of Fullview Corporation filed a federal income tax return for fiscal year ended October 31, 1959 reporting net taxable income of $491,083.42 before a net operating loss deduction. It paid income taxes thereon of $249,863.38 plus interest of $3,274.27 as follows:

Date Paid	Amount
1-15-60	$50,000.00
2-15-60	25,000.00
3-22-60	25,000.00
4-21-60	25,000.00
5-19-60	25,000.00
7- 1-60	25,000.00
7-21-60	25,000.00
7-29-60	25,000.00
10- 4-60	27,863.38
11-15-60	3,274.27

On May 10, 1963, additional income taxes of $4,426.93 plus interest of $131.05 were paid. The correct taxable income for fiscal year ended October 31, 1959 before a net operating loss deduction is $499,596.76.

6. The taxpayer received a prior refund for fiscal year ended October 31, 1959 of $57,000.21 plus interest of $406.81 based upon a net operating loss carryback of $109,615.78 from fiscal year ended October 31, 1962.

7. The plaintiff, under the name Fullview Corporation, filed a federal income tax return for fiscal year ended October 31, 1960 reporting net taxable income of $544,245.60 before a net operating loss deduction. It paid income taxes thereon of $278,027.71 plus interest of $10,944.11 as follows:

Date Paid	Amount
5- 3-61	$25,000.00
6-15-61	25,000.00
7-17-61	25,000.00
8-15-61	25,000.00
9-15-61	25,000.00
10-16-61	25,000.00
10-31-61	138,971.82

The correct taxable income for fiscal year ended October 31, 1960 before a net operating loss deduction is $545,245.60.

8. The plaintiff, under the name of Mirro-Dynamics Corporation, filed a federal income tax return for fiscal year ended October 31, 1961 reporting a net operating loss of $186,229.90. The plaintiff is entitled to a dividend received deduction of $8,292.46 for fiscal year ended October 31, 1961. The net operating loss of $186,229.90 for said year is increased by $8,292.46.

9. The plaintiff, under the name of Mirro-Dynamics Corporation, filed a federal income tax return for fiscal year ended October 31, 1962 reporting a net operating loss of $109,615.78. It also reported on said return a loss of $905,861.47 from the purchase and sale of securities and other miscellaneous stock transactions, designating the $905,861.47 loss as a capital loss. The plaintiff is entitled to a dividend received deduction of $9,097.59 and a state transfer tax deduction of $5,364.24 for fiscal year ended October 31, 1962. The net operating loss of $109,615.78 for said year is increased by $14,461.83.

10. On September 6, 1963, plaintiff filed timely claims for refund for fiscal years ended October 31, 1959 and October 31, 1960 respectively, contending that the net operating loss provisions of the 1954 Internal Revenue Code applied to the $905,861.27 loss from security transactions, said loss being alleged to be an ordinary loss. Plaintiff also claimed that federal stock transfer taxes of $1,592.60 paid during fiscal year ended October 31, 1962, were business deductions.

These claims were rejected subsequently by the District Director of Internal Revenue, Los Angeles.

11. On November 8, 1963, the plaintiff filed a timely claim for refund for fiscal year ended October 31, 1958, contending that its unsold securities on hand at October 31, 1961 constituted business inventory, and that it should be entitled to value this inventory at cost or market, whichever is lower, in accordance with applicable provisions of the Internal Revenue Code. Accordingly, it claimed a business inventory loss of $72,580.92 and applied the net operating loss provisions of the Internal Revenue Code to said loss.

This claim was also rejected by the District Director of Internal Revenue, Los Angeles.

12. Prior to April 1961, the plaintiff had been engaged in the business of manufacturing and selling sliding glass doors under the name of Fullview Corporation.

13. In the spring of 1961, the plaintiff sold substantially all of its assets, changed its name to Mirro-Dynamics Corporation, and discontinued its sliding glass door business.

14. During the fiscal years ended October 31, 1961 and October 31, 1962, the plaintiff purchased and sold securities and conducted other miscellaneous stock transactions solely for its own account.

15. During these fiscal years, plaintiff had accounts with several established brokerage firms and through these brokerage firms bought and sold a substantial number of securities.

16. During these fiscal years, neither the plaintiff nor its officers were members of any stock exchange, nor were they licensed or registered with the Securities and Exchange Commission as a broker or dealer in

securities, nor were they licensed or registered by the State of California to sell securities to the general public.

17. Any conclusions of law deemed as, or properly constituting a finding of fact is hereby adopted as a finding of fact.

II.

CONCLUSIONS OF LAW.

From the foregoing Findings of Fact, the Court concludes as follows:

1. The Court has jurisdiction over these proceedings and the parties under the provisions of Title 28 United States Code, Sections 1340 and 1346(a).

2. The plaintiff is not a dealer in securities, *Schafer v. Helvering,* 299 U.S. 171 (1936); Commissioner's Regulations 1.471.5.

3. The securities purchased and sold by the plaintiff during fiscal years ended October 31, 1961 and October 31, 1962 are capital assets within the meaning of Title 26 United States Code 1221. Accordingly, the plaintiff's $905,861.47 loss from stock transactions for fiscal year ended October 31, 1962 is a capital loss.

4. The plaintiff's unsold securities at October 31, 1961 are not business inventories within the meaning of Title 26 United States Code 471 and Commissioner's Regulations 1.471.5.

5. Federal stamp taxes paid on the sale of securities by the plaintiff in the amount of $1,592.60 are not deductible as an ordinary and necessary business expense, but may be offset only against the gross selling price in determining capital gain or loss.

6. For the fiscal year ended October 31, 1958, the plaintiff is entitled to a judgment of $4,312.08 together with interest as provided under Title 28 United States Code, Section 2411(a) and costs as provided under law, to be taxed by the Clerk of the Court, based upon a net operating loss carry-back from fiscal year ended October 31, 1961 of $8,292.46.

7. For the fiscal year ended October 31, 1959, the plaintiff is entitled to a judgment of $7,518.07 together with interest as provided under Title 28 United States Code, Section 2411(a) and costs as provided under law, to be taxed by the Clerk of the Court, based upon a net operating loss carry-back from fiscal year ended October 31, 1962 of $14,461.83.

8. For the fiscal year ended October 31, 1960, the plaintiff takes nothing, and the defendant is entitled to a judgment dismissing the complaint with prejudice.

9. Any finding of fact deemed as or property constituting a conclusion of law is hereby adopted as a conclusion of law.

Judgment shall be entered accordingly.

DATED: November 22, 1965.

JESSE W. CURTIS,
United States District Judge.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Mirro-Dynamics Corporation, *Appellant,* vs. United States of America, *Appellee.* Nos. 20,799, 20,800, 20,-801.

[March 10, 1967]

On Appeal from the United States District Court for the Southern District of California, Central Division [now the United States District Court for the Central District of California]

Before: Jones, Senior Judge, United States Court of Claims,* and Barnes and Ely, Circuit Judges.

Jones, Senior Judge:

Taxpayer, a California corporation, appeals the judgment of the United States District Court for the Southern District of California granting the government's motion for summary judgment: *Mirro-Dynamics Corp. v. United States,* 247 F. Supp. 214 (1965).

Taxpayer claims an overpayment of federal income taxes for the fiscal years ending October 31, 1958, 1959, and 1960. Timely claims for refund were filed. Jurisdiction was conferred on the district court by 28 U.S.C. §§ 1340 and 1346 (a)(1). Jurisdiction is conferred on this court by 28 U.S.C. § 1291.

From 1947 to April 1961, taxpayer, using the names Pacific Bolt Corporation and Fullview Corporation, manufactured and sold sliding glass doors. In April

*Sitting by designation of the Chief Justice.

1961, taxpayer sold its assets for about $1 million, terminated its previous operations entirely, changed its name to Mirro-Dynamics Corporation, and began the purchase and sale of securities. Apparently taxpayer was successful initially, but during 1962 it suffered losses on the transactions.

Before the district court, taxpayer asserted that these losses were ordinary losses—resulting from the sale at a loss of non-capital assets—which could properly be carried back to the profitable years of 1959 and 1960, producing a tax refund. Int. Rev. Code of 1954, § 172. Taxpayer also claimed that it had repriced its closing inventory for 1961, giving rise to a net operating loss to be carried back to 1958. Third, taxpayer claimed a refund caused by a deduction for federal transfer taxes paid in fiscal year 1962. 247 F. Supp. at 216.

The basis of taxpayer's argument is that after April 1961, it was in the business of purchasing and selling securities. While it engaged in thousands of separate transactions, it contends that it did not at any time deal from an investment motive. The securities, taxpayer claims, were property held for sale to its customers and therefore were non-capital because within the exceptions to the definition of capital assets set forth in Int. Rev. Code of 1954, § 1221(1)

> § 1221. Capital asset defined
>
> For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—
>
> (1) stock in trade of the taxpayer or other property of a kind which would properly be included in

> the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

The government responded to this argument by noting that during the period in question neither taxpayer nor its officers were members of a stock exchange, nor were they licensed by either the Securities and Exchange Commission or the State of California to sell securities to the public. It followed that taxpayer bought and sold the securities on its own account, since it could not have customers. The district court agreed, and held as a matter of law that this disability prevented taxpayer's assets from coming within the exceptions to § 1221(1), specifically, the phrase requiring the property to be held "for sale to customers.

Taxpayer, in an attempt to show that its assets qualify under this phrase, cites *Malat v. Riddell,* 383 U.S. 569 (1966), as differentiating between gains and losses "arising from the everyday operation of a business," and the "realization of appreciation accrued over a substantial period of time." *Id.* at 572. Taxpayer contends that since its purchases and sales were made in less than a substantial period of time they were made in the course of its everyday operation and therefore resulted in "profits and losses arising from the everyday operation of a business." In regard to the requirement of § 1221(1) that the sales must be to customers, taxpayer urges that if one is in the business, any sale is to a customer. Therefore, the sale at a loss of these non-capital assets resulted in an ordinary loss.

However, the difficulty which taxpayer faces here, and which it has not overcome, is not in showing that it bought and sold securities in the same time sequence as a legitimate dealer would, or even in showing that the securities it sold eventually reached customers, but in showing it was a dealer with customers to whom it could sell securities in the ordinary course of business. This becomes particularly clear when we note that the phrase "to customers" was added to the predecessor of § 1221(1) to exclude from the definition of capital assets only those securities bought and sold by dealers, and not those traded by investors on their own account. Section 117, Revenue Act of 1934, c. 277, 48 Stat. 680, 714; H. Conf. Rep. No. 1385, 73d Cong., 2d Sess., p. 22 (1939-1 Cum. Bull. (Part 2)) 627, 632; Cf. S. Rep. No. 558, 73d Cong., 2d Sess., p. 12 (1939-1 Cum. Bull. (Part 2)) 586, 595.

We therefore affirm the holding of the district court that the securities bought and sold by taxpayer were capital assets and that losses resulting from these transactions were capital losses, not susceptible to the carryback provisions of § 172.

With respect to taxpayer's second claim, it follows that these capital assets were not business inventory. Taxpayer was not a dealer in securities within the definition contained in Treas. Reg. § 1.471-5. We therefore affirm the district court on this point also.

Taxpayer's contention that the federal stock transfer stamp taxes which it paid in 1962 should be deductible as an ordinary and necessary business expense under § 162 is perhaps the most troublesome.

The United States Court of Claims, in *Hirshon v. United States,* 113 F. Supp. 444, 445 (1953), stated:

> If one's business is that of trading in stocks, and if he must pay a tax whenever he trades, the tax would seem to be an ordinary and necessary business expense, and therefore deductible under the express terms of the statute [predecessor to § 162].

The court held in *Hirshon* that the government could not on the basis of an administrative instruction (I.T. 3806, 1946-2 Cum. Bull. 41) exclude traders (i.e., those buying and selling securities on their own account, like taxpayer here) from the deduction, while allowing it to dealers.

In the case before us the district court viewed I.T. 3806 in a different light, as distinguishing between those who carry on a trade or business in securities and who are entitled to a deduction, and investors on their own account, who are not so entitled. 247 F. Supp. at 218. Under this approach the tax paid by appellant would be considered a selling cost. We accept this view since we have already held that taxpayer was not a dealer. It should be noted however that taxpayer was more than a casual investor. The sole function of the Mirro-Dynamics Corporation after April 1961, was buying and selling securities. On a close question we agree with the district court that while taxpayer may offset the amount paid for federal stamp taxes against gross selling price, it may not deduct the amount as an ordinary and necessary business expense.

Affirmed.